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IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *et al.*,
Petitioners,

v.

WILLIAM TWOMBLY, *et al.*, Individually and on Behalf of all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* LEGAL SCHOLARS DEBRA LYN BASSETT, JOSEPH P. BAUER, JOHN S. BECKERMAN, KEVIN M. CLERMONT, WILLIAM V. DORSANEO III, CHRISTOPHER M. FAIRMAN, JACKIE GARDINA, SUSAN HARTHILL, ALLAN IDES, DANNE L. JOHNSON, DAVID LEVINE, TYLER T. OCHOA, STEPHEN A. SALTZBURG, GREGORY C. SISK, JOAN E. STEINMAN, JEFFREY W. STEMPEL, BETH STEPHENS AND ELIZABETH G. THORNBURG, AND OF CERTAIN PURCHASERS OF ELEVATORS AND ELEVATOR MAINTENANCE SERVICES, INCLUDING TRANSHORN LTD., *ET AL.* IN SUPPORT OF RESPONDENTS

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PETITIONERS' QUESTION PRESENTED

Whether a complaint states a claim under Section 1 of the Sherman Act, 15 U.S.C. §1, if it alleges that the defendants engaged in parallel conduct and adds a bald assertion that the defendants were participants in a "conspiracy," without any allegations that, if later proved true, would establish the existence of a conspiracy under the applicable legal standard.

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In re Tower Air, Inc., 416 F.3d 229 (3d Cir. 2005)	8, 13
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SECONDARY AUTHORITIES

John Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*,
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TABLE OF AUTHORITIES—Continued

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Paul D. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 Colum., L. Rev. 1516 (1998) 6

Charles E. Clark, *Simplified Pleading*, 2 FRD 456 (1943) 5, 6, 7, 8

Charles E. Clark, *Handbook of the Law of Code Pleading*, §380020 (2d ed. 1947) ..... *passim*

Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937) 6

Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447 (1936) 6

Charles E. Clark, *The Handmaid of Justice*, 23 Wash. U.L.Q. 297 (1938) 6

The Complaint Under the Federal Rules of Civil Procedure, 10 Fordham L. Rev. 252 (1941) 9

Palmer D. Edmunds, *The New Federal Rules of Civil Procedure*, 4 John Marshall L.Q. 291 (1938) 7

Christopher M. Fairman, *An Invitation to the Rulemakers –Strike Rule 9(b)*, 38 U.C. Davis L. Rev. 281 (2004) 22

Christopher M. Fairman, *Heightened Pleading*, 81 Tex. L. Rev. 551 (2002) 7, 16, 19

Christopher M. Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. 987 (2003) 15, 16, 19, 20

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William S. Lerach & Eric Alan Isaacson, *Pleading Scienter Under Section 21D(b)(2) of the Securities Exchange Act of 1934: Motive, Opportunity, Recklessness, and the Private Securities Litigation Reform Act of 1995*, 33 San Diego L. Rev. 893 (1996) 24, 25

Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 Tex. L. Rev. 1749 (1998) 19, 24

Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433 (1986) 6, 24

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Rules of Civil Procedure, Am. Jud. Soc. Bull. 14 ..... 22, 23

Hillary Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Affect of the PSLRA's Internal Information Standard on '33 and 34 Act Claims*, 76 Wash. L. Q. 537 (1998) 25-26

Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 Yale L. J. 914 (1976) 6

5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil 3d* §1202 91 (3d ed. 2004) 5, 20

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INTEREST OF *AMICI CURIAE* [1]

Amici filing this brief comprise two distinct groups: (1) legal scholars and law professors with an academic interest in

[1] No counsel for any party before the Court in this proceeding has authored this brief or any portion of it. As noted in text, counsel of record represent several of the *amici* as plaintiffs-appellants in a case currently pending before the United States Court of Appeals for the Second Circuit. *See In re Elevator Antitrust Litig.*, No. 06-3128-cv (2d Cir.), *on appeal from In re Elevator Antitrust Litig.*, No. 04-cv-01178 (TPG) (S.D.N.Y.). They may ultimately seek compensation in that case for the work and expenses incurred in preparing this brief.

sound development of procedural law having no financial interest in the outcome of this case, and (2) purchasers of elevators and elevator maintenance services who are currently litigating antitrust claims in the Second Circuit.

The *amici* who are legal scholars teach, write about, or have an interest in Federal Civil Procedure. They care deeply about the fundamental principles underlying the pursuit of justice in the American legal system, and are committed to ensuring that procedural law continues to develop in accordance with those principles. They have a strong interest in assisting this Court to interpret the law in a way that is consistent with both the Federal Rules of Civil Procedure's text and their underlying purpose—"to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. They have no interest in the outcome of this litigation except as it pertains to these concerns.

The academic *amici* are:

Debra Lyn Bassett, Loula Fuller and Dan Myers Professor of Law, Florida State University College of Law;

Joseph P. Bauer, Professor of Law, Notre Dame Law School;

John S. Beckerman, Associate Dean for Academic Affairs, Rutgers School of Law-Camden;

Kevin M. Clermont, James and Mark Flanagan Professor of Law, Cornell Law School;

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Jackie Gardina, Associate Professor of Law, Vermont Law School;

Susan Harthill, Assistant Professor of Law, Florida Coastal School of Law;

Allan Ides, Professor of Law and William M. Rains Fellow, Loyola Law School (Los Angeles);

Danne L. Johnson, Assistant Professor of Law, Oklahoma City University School of Law;

David Levine, Professor of Law, University of California Hastings College of the Law;

Tyler T. Ochoa, Professor of Law, Santa Clara University School of Law;

Stephen A. Saltzburg, Wallace and Beverly Woodbury University Professor of Law, The George Washington University Law School;

Gregory C. Sisk, Professor of Law, University of St. Thomas School of Law;

Joan E. Steinman, Distinguished Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology;

Jeffrey W. Stempel, Doris S. & Theodore B. Lee Professor of Law, University of Nevada, Las Vegas William S. Boyd School of Law;

Beth Stephens, Professor of Law, Rutgers School of Law-Camden; and

Elizabeth G. Thornburg, Professor of Law, Southern Methodist University Dedman School of Law.

Finally, the following *amici* are purchasers of elevators and elevator maintenance services, who are serving as representative plaintiffs in an antitrust action currently pending before the United States Court of Appeals as *In re Elevator Antitrust Litigation*, No. 06-3128-cv (2d Cir.), a case in which briefing is likely to be completed after the scheduled oral argument in this matter: Transhorn, Ltd.; 1775 Housing Associates; Triangle Housing Associates L.P.; Rochdale

Village, Inc.; Birmingham Building Trades Towers, Inc.; Riverbay Corp.; D.F. Chase, Inc.; Towers of Coral Springs Ltd.; 181 Maple Avenue Associates; Lenox Road Associates; Olen Commercial Realty Corp.; Bay Crest Condominium Ass'n; Joseph M. Bennardi d/b/a Nedmac Associates, Inc.; and Joseph M. Bennardi d/b/a Building Supers of Camden, Inc. These *amici* have an interest in the outcome of this case because it may constitute a controlling precedent for the pleading standards in their own antitrust case.

On August 18, 2006, the parties filed written consent with this Court to the filing of *amicus curiae* briefs, including this brief. *See* S. Ct. Rule 37.3(a).

ARGUMENT

I. NOTICE-PLEADING PRINCIPLES RELIEVE PLAINTIFFS OF PLEADING FACTS TO DEMONSTRATE THEIR CLAIMS

Petitioners' Brief presents the case as one that turns upon general pleading rules—which they contend require detailed fact pleading. Their Argument opens:

> This Court's decisions establish two fundamental pleading rules that bear decisively on this case. First, a complaint must allege facts, not merely conclusions, that show the plaintiff is entitled to relief under the governing substantive law. Second, it is the facts alleged, not alleged facts that the plaintiff might later prove, that must support the claim to relief.

Petitioners' Brief at 16. Petitioners' central contention is stated bluntly in their Argument's subheading I.A.: "Rule 8 Requires Pleading of Facts, Not Mere Conclusory Assertions, To Support a Plaintiff's Claim." *Id.*

Petitioners' argument runs counter to this Court's long-standing notice-pleading decisions, which all hold that plaintiffs need only provide the short statement required by

Federal Rule of Civil Procedure 8(a) to place defendants on notice of the nature of the claims against them—without providing the facts and evidence that might ultimately be used to prove those claims. Petitioners' argument also runs counter to the very purpose of the Federal Rules of Civil Procedure which were designed to replace both the technicalities of common law pleadings and the detail of "code" or "fact-pleading" with a new regime of simplified notice pleading. *See generally* Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 456-67 (1943); Charles E. Clark, *Handbook of the Law of Code Pleadings* §38, at 241-43 (2d ed., 1947).

"Under the codes the emphasis was placed on developing the facts through the pleadings."[2] The Federal Rules' framers rejected that approach for one that requires a pleading only to give "the opposing party fair notice of the nature and basis or grounds of the pleader's claim and a general indication of the type of litigation that is involved."[3]

> It was the design of the rulemakers that the discovery procedures should give the parties an opportunity for securing an elaboration of the allegations and that process and not the pleadings bears the burden of filling in the details of the dispute for the parties and the court. In federal practice, the test of a complaint's sufficiency simply is whether the document's allegations are detailed and informative enough to enable the defendant to respond.[4]

Judge Charles E. Clark, who as Dean of the Yale Law School "served as Reporter of the Advisory Committee on the Federal Rules,"[5] is widely recognized as the Rules' "principal

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[2] 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil 3d* §1202, at 91 (3d ed. 2004).

[3] *Id.*, §1215, at 172-73.

[4] *Id.*, §1215, at 174-93.

[5] *Harris v. Nelson*, 394 U.S. 286, 290 n.1 (1969).

architect,"[6] and has even been called their "father."[7] He explained that the goal for pleadings is to "emphasize only the setting forth of the factual situation as a whole," and not "all the fine details" or evidentiary facts that may be needed to prove the claim.[8] The Rules' framers understood that even in the simplest negligence case, where percipient witnesses viewed an automobile accident,

> the testimony of even honest eyewitnesses may vary or conflict, and a slight difference in the timing of events, such as when a pedestrian stepped into the street in front

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[6] *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 296-97 (1973) (Clark "a principal architect").

[7] *Commerzanstalt v. Telewide Sys.*, 880 F.2d 642, 646 (2d Cir. 1989) (quoting M. Schick, *Learned Hand's Court* 30-31 & n.81 (1970)); *see* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 433 (1986) ("As Dean of Yale Law School and reporter of the committee that drafted the Federal Rules of Civil Procedure, Charles Clark was the principal architect of the Rules and leading proponent of the liberal ethos that underlies them."); Michael E. Smith, *Judge Charles E. Clark and The Federal Rules of Civil Procedure*, 85 Yale L. J. 914, 915 (1976) ("he was principally responsible for the drafting of the Federal Rules, which became law in 1938."); Paul D Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 Colum. L. Rev. 1516, 1518 & n.10 (1998) (noting that the movement to reform the Federal Rules "was led by Charles Clark and his associates, who drafted the Federal Rules of Civil Procedure promulgated in 1938"); *Whalen v. Ford Motor Credit Co.*, 684 F.2d 272, 277 (4th Cir. 1982) ("Clark, as reporter [was] necessarily the member most familiar with the rules.").

[8] Clark, *Simplified Pleading*, 2 F.R.D. at 457; *see also* Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937) ("Moreover, through the weapons of discovery and summary judgment we have developed new devices, with more appropriate penalties to aid in matters of *proof*, and do not need to force the pleadings to their less appropriate function."); Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 449-50 (1936); Charles E. Clark, *The Handmaid of Justice*, 23 Wash. U.L.Q. 297, 316 (1938).

> of an approaching car, may be absolutely decisive. A lawyer, therefore, cannot safely or wisely restrict the case he offers to prove before he knows what the testimony will actually show.

Clark, *Simplified Pleading*, 2 F.R.D. at 457.

Even in the simplest of cases, a lawyer cannot, in fine, plead all the facts that ultimately will be needed to prove a case. *Id.* Much less can he do so when the case turns on a complex conspiracy, rather than a simple tort.[9] Summarizing the then-new "notice pleading" in 1938, Commissioner Palmer D. Edmunds wrote: "The idea is that you are not to be compelled to state a cause of action giving all of the elements which we now think necessary to a case. All that should be needed is an informal statement of what you are suing about." Palmer D. Edmunds, *The New Federal Rules of Civil Procedure*, 4 John Marshall L.Q. 291, 298 (1938).

Petitioners ask this Court to require much more—the pleading of facts to support a claim. But that is a requirement that the Federal Rules' framers deliberately eliminated to mark a clear departure from past pleading practice. In Rule 8(a), "the drafters of the Federal Rules substituted the word 'claim' for 'cause of action,' dropped the requirement that the complaint allege 'facts,' and expanded discovery procedures," to ensure that a claim may be simply stated with the critical facts to be developed in discovery. *Hodgson v. Virginia Baptist Hosp.*, 482 F.2d 821, 823 (4th Cir. 1977). "Any need to plead facts that, if true, establish each element of a 'cause of action' was abolished by the Rules of Civil Procedure in 1938." *Sanjuan v Am. Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994) (Easterbrook, J.). Simply put: "The federal rules replaced fact pleading with notice pleading." *Thomson v. Washington*, 362 F.3d 969, 970 (7th Cir. 2004) (Posner, J.); *see also*

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[9] *See, e.g., Palmer v. Bd. of Educ.*, 46 F.3d 682, 688 (7th Cir. 1995).

Christopher M. Fairman, *Heightened Pleading*, 81 Tex. L. R. 551, 556 (2002).

The Rules' chief architect explained: "By omitting any reference to 'facts' the Federal Rules have avoided one of the most controversial points in code pleading." Clark, *Handbook of the Law of Code Pleading* §38 at 242. "This departure from the traditional code-pleading requirement has been liberally applied by the courts and lauded by the legal writers," Judge Clark noted in 1947. *Id.* at 242-43. Sound decisions follow it still: "Complaints need not plead facts . . . . It is enough if the complaint puts the defendants on notice of the claim and that some set of facts could be presented that would give rise to a right to relief." *Hutchinson ex rel. Baker v. Spink*, 126 F.3d 895, 900 (7th Cir. 1997).[10]

Demanding particularized facts, the Rules' framers understood, "leads to a waste of time while counsel and court attempt to pursue the will-o'-the wisp of pleading certainty," and it far too "often leads to a denial of justice," when meritorious claims are dismissed on the pleadings. Clark, *Simplified Pleading*, 2 F.R.D. at 457-458. That is why this Court's precedents allow a plaintiff to proceed who may be able to prove *any set of facts* to support the claim asserted.

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[10] *Accord, e.g.*, *Kolupa v. Roselle Park Dist.*, 438 F.3d 713, 715 (7th Cir. 2006) ("complaints need not plead facts and need not narrate events that correspond to each aspect of the applicable legal rule" to survive a motion to dismiss); *In re Tower Air, Inc.*, 416 F.3d 229, 237 (3d Cir. 2005) ("By requiring [a plaintiff] to allege specific facts, the District Court erroneously preempted discovery on certain claims by imposing a heightened pleading standard not required by Federal Rule of Civil Procedure 8."); *Hoskins v. Poelstra*, 320 F.3d 761, 764 (7th Cir. 2003) ("Rule 8 does not require—or permit district judges to require—fact pleading."); *Palmer*, 46 F.3d at 688 ("[c]omplaints need not plead facts"); *Brownlee v. Conine*, 957 F.2d 353, 354 (7th Cir. 1992) ("The Federal Rules of Civil Procedure establish a system of notice pleading rather than of fact pleading, so the happenstance that a complaint is 'conclusory,' whatever exactly that overused lawyers' cliche means, does not automatically condemn it." (citation omitted)).

A. This Court Holds That Plaintiffs Are Not Required To Plead Facts Establishing Their Claims

Since the Federal Rules of Civil Procedure took effect in 1938, replacing both common-law pleading and code or "fact pleading" with the new rule of *notice pleading*, this Court has had many occasions to reiterate that plaintiffs are entitled to plead a case without detailing the facts that ultimately may be used to prove it. Rather, a claim is sufficient if a plaintiff might prove *any set of facts* that would entitle it to relief.

In *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), this Court held that "[i]n appraising the sufficiency of the complaint, we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim *unless it appears beyond doubt that the plaintiff can prove no set of facts* in support of his claim which would entitle him to relief."[11] Thus, there must be enough factual detail for the defendants to understand the nature of the case against them, and for the Court to hypothesize that *some* set of facts might be proved to warrant relief. But that is all. The respondents in *Conley* had argued "that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal [was] therefore proper." *Conley*, 355 U.S. at 47. "The decisive answer to this," this Court bluntly held, "is that the Federal Rules of Civil Procedure *do not require a*

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[11] *Id.* at 45-46 (emphasis added). This was, as *Conley* noted, clearly "the accepted rule." *Id.* Early decisions were emphatic: "'The Rules of Civil Procedure do not require that a plaintiff shall plead every fact essential to his right to recover the amount of which he claims . . . . If it is conceivable that, under the allegations of his complaint, a plaintiff can, upon trial, establish a case which would entitle him to the relief prayed for, a motion to dismiss for insufficiency of statement ought not to be granted." *Sparks v. England*, 113 F.2d 579, 581-82 (8th Cir. 1940); *see The Complaint Under the Federal Rules of Civil Procedure*, 10 Fordham L. Rev. 252, 258-59 (1941) (quoting *Sparks*); Clark, *Handbook of the Law of Code Pleading*, § 38 at 242-43 & nn.104-105.

claimant to set out in detail the facts upon which he bases his claim." *Id.* (emphasis added). This Court found a claim under the Railway Labor Act sufficiently stated by employing conclusory or "general" allegations of discrimination. *Id.* Whether facts existed to flesh out and sustain those claims would have to be left to discovery. *See id.*

Nearly two decades later, in *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), this Court held again that a complaint cannot be dismissed because the plaintiff fails to plead facts showing that he or she will likely prevail. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test," the Court concluded, reiterating *Conley's* rule that "'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* at 236 (quoting *Conley*, 355 U.S. at 45-46).

In *Hishon v. King & Spalding*, 467 U.S. 69 (1984), this Court reiterated once more: "A court may dismiss a complaint only if it is clear that no relief could be granted *under any set of facts* that could be proved consistent with the allegations." *Id.* at 73 (citing *Conley*, 355 U.S. at 45-46) (emphasis added). And this is the standard that it has consistently applied—that a complaint cannot be dismissed if relief could be granted "under any set of facts" that the plaintiff might prove. *See, e.g., Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (quoting *Hishon*); *NOW v. Scheidler*, 510 U.S. 249, 256 (1994); *H. J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 249-50 (1989) (quoting *Hishon*); *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (quoting *Hishon*); *see also Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 98-99 (1989) (Stevens, J., joined by Scalia, J., concurring and dissenting in part) (quoting *Hishon*).

These decisions, allowing plaintiffs to proceed if "any set of facts" might be proved entitling them to relief, surely

foreclose Petitioners' argument that "it is the facts alleged, not unalleged facts that the plaintiff might later prove, that must support the claim to relief." Petitioners' Brief at 16. If a plaintiff might later prove "any of set facts" supporting the claim presented, then the complaint *must not be dismissed. Hishon*, 467 U.S. at 73; *accord Scheuer*, 416 U.S. at 236; *Conley*, 355 U.S. at 45-46. "At this stage the plaintiff receives the benefit of imagination, so long as the hypotheses are consistent with the complaint," as Judge Frank Easterbrook has aptly observed. *Sanjuan*, 40 F.3d at 251 (Easterbrook, J., citing *Conley*). "Matching facts against legal elements comes later." *Id.*

This Court restated this notice-pleading rule in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990), in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), and in *NOW*, 510 U.S. at 256. All three decisions reaffirmed "that 'at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.'" *NOW*, 510 U.S. at 256 (quoting and following *Defenders of Wildlife*, 504 U.S. at 561 (quoting and following *National Wildlife Federation*, 497 U.S. at 889)).

The Court's decisions draw a sharp distinction between pleading a claim, when general or conclusory allegations suffice, and proving it—when facts are required. *National Wildlife Federation* and *Defenders of Wildlife* both held that to survive a Rule 56 motion for summary judgment the plaintiff must present specific facts supporting its claim. This, the Court emphasized, was in direct contrast to the requirements of 12(b)(6), that general allegations suffice, with any specific facts that might be needed to support the claim *presumed. See Nat'l Wildlife Fed'n*, 497 U.S. at 889 (citing *Conley*, 355 U.S. at 45-46). In *Defenders of Wildlife* this Court explained:

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presume that general allegations embrace those specific facts that are necessary to support the claim." *National Wildlife Federation, supra,* [497 U.S.] at 889. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." [*Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 115 n. 31 (1979)].

Defenders of Wildlife, 504 U.S. at 561. Clearly, a plaintiff is not required to *plead* the facts that will later be required either to survive a summary judgment motion, or to prevail at trial.

Indeed, in *NOW*, the Court applied these principles to a motion to dismiss. Women's health clinics alleged that anti-abortion activists had "conspired to use force to induce clinic staff and patients to stop working and obtain medical services elsewhere." *NOW*, 510 U.S. at 256. Tracking RICO's statutory text, and in rather conclusory fashion, the "[p]etitioners claimed that this conspiracy 'has injured the business and/or property interests of the [petitioners].'" *Id.* at 256 (quoting complaint); *compare* 18 U.S.C. §1964(c) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . .").

Although the lower courts had dismissed the case, this Court reversed, explaining:

> We have held that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those

> specific facts that are necessary to support the claim." [*Defenders of Wildlife*, 504 U.S. at 561] (citations omitted). The District Court dismissed petitioners' claim that the pleading stage pursuant to Federal Rule of Civil Procedure 12(b)(6), so their complaint must be sustained if relief could be granted "*under any set of facts* that could be proved consistent with the allegations." [*Hishon*, 467 U.S. at 73].

NOW, 510 U.S. at 256 (emphasis added).

Thus, where a complaint states a potentially valid claim, the question is not whether facts necessary to support that claim have been pleaded, but whether "any set of facts"—whether or not specifically pleaded—might ultimately be proved that would entitle the plaintiff to relief. The plaintiff need not allege a specific fact for each element of the claim. *In re Tower Air*, 416 F.3d at 237.

B. Notice-Pleading Presumptions Apply With Particular Force To Antitrust Cases

Petitioners' contention that antitrust claims must meet a heightened standard are flatly at odds with this Court's controlling precedents. For this Court has repeatedly emphasized that notice-pleading principles apply *with particular force* to antitrust cases.

This Court's first opinion reviewing the sufficiency of a complaint following the adoption of the Federal Rules upheld general allegations of a conspiracy to drive billposting companies out of business in violation of the Sherman Act. The plaintiff charged that it "'has been damaged in that its business was rendered unprofitable, and the profits of its said trade and commerce have diminished, and the plaintiff company has suffered loss and been damaged thereby.'" *C.E. Stevens Co. v. Foster & Kleiser Co.*, 311 U.S. 255, 261 (1940). "While these allegations are general," this Court held, "we cannot say that they are inadequate," excusing

antitrust claimants from any requirement of pleading particularized facts. *Id.*

In *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976), this Court held that dismissal at the pleading stage should be granted "very sparingly" in antitrust cases because "'the proof is largely in the hands of the alleged conspirators'" (quoting *Poller v. CBS*, 368 U.S. 464, 473 (1962)). The Court explained:

> We have held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." [*Conley*, 355 U.S. at 45-46] (footnote omitted). And in antitrust cases, where "the proof is largely in the hands of the alleged conspirators," [*Poller*, 368 U.S. at 473], dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

Hospital Bldg. Co., 425 U.S. at 746.

In *McLain v. Real Estate Board*, 444 U.S. 232 (1980), this Court deemed it "axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,'" holding once again that this rule of notice pleading applies "with no less force to a Sherman Act claim." *Id.* at 246 (quoting *Conley*, 355 U.S. at 45-46). Petitioners' contention that plaintiffs must meet a heightened standard for antitrust claims is flatly inconsistent with this Court's precedents.

Petitioners make much of a footnote of dictum from *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983), which dealt with claims of a construction workers' union that the antitrust laws were violated when members of a multi-employer association allegedly coerced their own customers and competitors to

give business to nonunion firms. *See id.* at 528 n.17; Christopher M. Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. 987, 1013 (2003). This Court held that "the Court of Appeals properly assumed that such coercion might violate the antitrust laws," but that the union, which was not directly injured by the alleged conspiracy, was not the proper plaintiff. *Associated Gen. Contractors*, 459 U.S. at 528, 544-46. Obviously skeptical that the union could prove the conspiracy it alleged, this Court added in a footnote that had the district court employed its power—presumably under Rule 12(e)—to demand a more definite statement and "required the Union to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss, it might well have been evident that no violation of law had been alleged." *Associated Gen. Contractors*, 459 U.S. at 528 n.17. "In making the contrary assumption for purposes of our decision," the Court wrote in dictum, "we are perhaps stretching the rule of [*Conley*, 355 U.S. at 47-48], too far." *Id.* It applied *Conley* nonetheless.

In *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), moreover, this Court formulated summary judgment standards against the background provided by notice-pleading rules that preclude termination of an antitrust case on a motion to dismiss:

> Before the shift to 'notice pleading' accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of 'notice pleading,' the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment.

Celotex, 477 U.S. at 327.

The time for plaintiffs to produce facts supporting their claims is in response to a motion for summary judgment—after a reasonable opportunity for discovery. An antitrust case cannot be dismissed merely because plaintiffs do not plead facts proving their claims.

C. Notice Pleading Revisited: When Lower Courts Ignore This Court's Precedents

The significance of this Court's many notice-pleading precedents should have been clear. Yet lower courts have nonetheless from time to time fashioned heightened pleading standards that they thought were good policy.[12] Some courts decided that civil-rights claims against governmental officials, or against municipalities, should be subject to heightened pleading standards, for example, with the Fifth Circuit requiring plaintiffs to "state with factual detail and particularity the basis for the claim." *Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985); *see also Boston & Maine*, 987 F.2d at 866; Fairman, *Heightened Pleading*, 81 Tex. L. Rev. at 575-82. Others demanded specific facts for antitrust claims—as in *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984), when the Seventh Circuit brushed aside this Court's notice-pleading precedents on the ground that they cannot mean what they very clearly say.

With *Sutliff*, the Seventh Circuit expressly rejected the standard of *Conley* and *Scheuer*, that a complaint cannot be dismissed if the plaintiff might prove any set of facts supporting its claim, on the ground that this Court's oft-repeated formulation "has never been taken literally." *Sutliff*, 727 F.2d at 654. After denigrating this Court's standard, the

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[12] *See Boston & Maine Corp. v. Town of Hampton*, 987 F.2d 855, 863-64 (1st Cir. 1993) (surveying cases); *Cash Energy, Inc. v. Weiner*, 768 F. Supp. 892, 897 (D. Mass. 1991) (surveying cases); *see generally*, Fairman, *Heightened Pleading*, 81 Tex. L. Rev. at 575-96; Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. at 1011-62.

Seventh Circuit took as more "authoritative the statement in an earlier [district court] case that the pleader must 'set out sufficient factual matter to outline the elements of his cause of action or claim, proof of which is essential to his recovery.'" *Id.* (quoting *Daves v. Hawaiian Dredging Co.*, 114 F. Supp. 643, 645 (D. Haw. 1953)). Although this Court had held in *Hospital Building Co.*, 425 U.S. at 746, that antitrust cases should seldom be dismissed before discovery, the Seventh Circuit disagreed, citing "heavy costs of modern federal litigation, especially antitrust litigation." *Sutliff*, 727 F.2d at 654. If one "claims an antitrust violation, but the facts he narrates do not at least outline or adumbrate such a violation, he will get nowhere merely by dressing them up in the language of antitrust." *Id.*

This position—that plaintiff may be required to plead facts demonstrating a violation—was put to rest by this Court's decisions in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz*, 534 U.S. 506.

In *Leatherman*, this Court unanimously reversed the Fifth Circuit for requiring a plaintiff pursuing civil rights claims to plead "all material facts establishing a plaintiff's right of recovery." *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 954 F.2d 1054, 1055 (5th Cir. 1992), *rev'd*, 507 U.S. at 167-69. This Court noted the Fifth Circuit's practice of requiring litigants pursuing civil rights claims against government officials to "'state with factual detail and particularity the basis for the claim.'" *Leatherman*, 507 U.S. at 167 (quoting *Elliott*, 751 F.2d at 1473). "In later cases, the Fifth Circuit extended this rule to complaints against municipal corporations asserting liability under § 1983." *Leatherman*, 507 U.S. at 167 (citing *Palmer v. San Antonio*, 810 F.2d 514 (5th Cir. 1987)). The Ninth Circuit, in stark contrast, had held that a "'"claim of municipal liability under [42 U.S.C.] section 1983 is sufficient to withstand a motion to dismiss even if the claim is *based on nothing*

more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice.'"" *Leatherman*, 507 U.S. at 165 (quoting *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 624 (9th Cir. 1988) (quoting *Shah v. County of Los Angeles*, 797 F.2d 743, 747 (9th Cir. 1986))).

This Court opted for the Ninth Circuit's rule, flatly rejecting the Fifth Circuit's as contrary to notice-pleading, reaffirming once more that the Federal Rules "'do not require a claimant to set out in detail the facts upon which he bases his claim.'" *Leatherman*, 507 U.S. at 168 (quoting *Conley*, 355 U.S. at 45-46. Only for averments of fraud or mistake does Rule 9(b) require a "greater particularity in pleading."). That Rule 9(b) specifies heightened pleading standards only for averments of fraud or mistake was dispositive: "*Expressio unius est exclusio alterius.*" *Leatherman*, 507 U.S. at 168. The Court concluded that heightening pleading requirements for any other allegations or claims—whether for civil rights or antitrust violations—"must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Id.*

Following this Court's decision in *Leatherman*, "the Advisory Committee on the Federal Rules of Civil Procedure, . . . rather pointedly, on October 21, 1993, rejected the idea of adding antitrust claims to the category of claims one must plead with particularity."[13] The Committee noted that "many courts have exacted heightened pleading requirements in specific types of litigation," including antitrust cases, often "without any explicit articulation or justification." *Minutes of the Advisory Committee on Federal Rules of Civil Procedure*, 1993 WL 761148, at *4. After discussing the values of notice pleading, the Committee suggested that "all that is needed is

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[13] *In re Hydrogen Peroxide Antitrust Litig.*, 401 F. Supp. 2d 451, 458 (E.D. Pa. 2005) (citing *Minutes of the Advisory Committee on the Federal Rules of Civil Procedure*, 1993 WL 761148, at *6-*7 (Oct. 21, 1993)).

some means of encouraging greater use of tools already in the Rules," concluding that to "encourage more pleading motions may be less satisfactory." *Id.*, at *5. Indeed, "increasing the Rule 9 categories of claims that must be pleaded with particularity seemed undesirable to virtually all committee members who spoke to the question." *Id.*, at *6.

The Seventh Circuit, at least, got *Leatherman's* message, and reversed its previous course—holding "that judicial attempts to apply a heightened pleading standard in antitrust cases had been 'scotched' by the Supreme Court's decision in *Leatherman*," and "that after *Leatherman*, an antitrust plaintiff need not include 'the particulars of his claim' to survive a motion to dismiss. It is instead sufficient for the plaintiff to include in its complaint only 'a short and plain statement of the claim' showing an entitlement to relief."[14]

Yet some courts continued to require plaintiffs to allege the *proof* for some claims by pleading facts.[15] Some lower courts still applied heightened pleading standard to many civil rights claims.[16] Others did so in antitrust cases.[17]

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[14] *MCM Partners v. Andrews-Bartlett & Assocs.*, 62 F.3d 967, 976 (7th Cir. 1995) (citing *Hammes v. AAMCO Transmissions*, 33 F.3d 774, 778, 782 (7th Cir. 1994) (noting that *Sutliff* "cannot be considered authoritative after *Leatherman*")); *see also Poindexter v. Nat'l Mortgage Co.*, No. 94 C 5814, 1995 U.S. Dist. LEXIS 5396, at *5-*6 (N.D. Ill. Apr. 18, 1995) ("[t]he Seventh Circuit's flirtation with heightened pleading requirements ended with the Supreme Court's reaffirmation of liberal pleading standards in *Leatherman*").

[15] *See* Fairman, *Heightened Pleading*, 81 Tex. L. Rev. at 583-90 (noting post-*Leatherman* circuit split); Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. at 1018-20 (antitrust), 1029-30 (civil rights), 1035-36 (conspiracy); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 Tex. L. Rev. 1749, 1763 & n.106 (1998) (listing cases).

[16] *See, e.g., Doe v. Hillsboro Indep. Sch. Dist.*, 81 F.3d 1395, 1402 & n.23 (5th Cir. 1996); *Branch v. Tunnell*, 14 F.3d 449, 455-57 (9th Cir. 1994); *Kimberlin v. Quinlan*, 6 F.3d 789, 794 n.9 (D.C. Cir. 1993), *cert. granted*, 513 U.S. 1123.

In *Swierkiewicz*, 534 U.S. at 511, this Court had to intervene once again, unanimously reversing Second Circuit precedent requiring employment discrimination plaintiffs to allege facts supporting a claim. Once more this Court had to say that "under a notice pleading system, *it is not appropriate to require a plaintiff to plead facts establishing a prima facie case*." *Id.* (emphasis added). Rule 8's "simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id.* at 512. Through those provisions, any "attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court." *Id.* at 513 (quoting 5 Wright & Miller, *supra*, §1202, at 76).

It should be clear, then, that antitrust complaints need contain no evidentiary facts. "While courts had previously applied a heightened pleading requirement in antitrust cases, this view has subsequently been rejected in favor of applying Rule 8(a)'s notice pleading standard."[18]

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[17] Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. at 1018-20 & n.207 (citing *e.g.*, *Dickson v. Microsoft Corp.*, 309 F.3d 193, 212-13 (4th Cir. 2002); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 220-22 (4th Cir. 1994); and *Syncsort Inc. v. Sequential Software, Inc.*, 50 F. Supp. 2d 318, 328 (D.N.J. 1999)).

[18] *Andrx Pharms., Inc. v. Elan Corp., PLC*, 421 F.3d 1227, 1234-1235 (11th Cir. 2005); *accord, e.g.*, *Lum v. Bank of Am.*, 361 F.3d 217, 220 (3d Cir. 2004) (antitrust claims "generally are not subject to the heightened pleading requirement of Rule 9(b)"); *MCM Partners*, 62 F.3d at 976 (*Le erman* "scotched" *Sutliff*); *In re Urethane Antitrust Litig.*, 409 F. Supp. 2d 1275, 1282 (D. Kan. 2005) ("heightened pleading standards do not apply to antitrust claims, particularly in light of the Supreme Court's reasoning in *Leatherman* and *Swierkiewicz*"); *see also United States v. LSL Biotechnologies*, 379 F.3d 672, 698-99 (9th Cir. 2004) (Aldisert, J. dissenting).

D. *Dura Pharmaceuticals* Works No Revolution In Pleading Standards

The Petitioners insist that *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), which dealt with requirements for proving and pleading loss in connection with a securities fraud claim, requires pleading of the facts that ultimately will be needed to support the plaintiff's claims, so that in antitrust cases, *any* "*pleading of conspiracy* requires factual allegations that directly support the existence of an agreement or, failing that, facts that support an inference that defendants conspired." Petitioners' Brief at 21 (emphasis added). But *Dura* merely holds that one who purchases a security at an inflated price thereby suffers no injury—for she might sell it at a similarly inflated price and suffer no loss. 544 U.S. at 342. Thus, a complaint asserting that investors purchased a security at an inflated price fails to plead a claim even under *Conley's* liberal notice-pleading rules. *Dura Pharms.*, 544 U.S. at 346-47. This Court emphasized that it "should not prove burdensome for a plaintiff who had suffered an economic loss to provide a defendant with *some* indication of the loss and the causal connection that the plaintiff has in mind." *Id.* at 347 (emphasis added); *see also In re Enron Corp. Sec. Derivative & ERISA Litig.*, 439 F. Supp. 2d 692, 700-01 & nn.9-10 (S.D. Tex. 2006).

II. UNDER FEDERAL RULE OF CIVIL PROCEDURE 9(b), CONSPIRATORIAL STATE OF MIND MAY BE AVERRED GENERALLY WITHOUT SETTING FORTH ANY FACTS FROM WHICH IT MIGHT BE INFERRED

Petitioners say that *any* "*pleading of conspiracy* requires factual allegations that directly support the existence of an agreement or, failing that, facts that support an inference that defendants conspired." Petitioners' Brief at 21 (emphasis added). This notion that plaintiffs must plead facts demonstrating a conspiratorial state of mind runs afoul not only of

this Court's notice-pleading precedents under Rule 8, *see supra*, it also conflicts with Rule 9(b)'s proviso that, whenever relevant, the "condition of mind of a person may be averred generally"—that is to say, without setting forth *any* evidentiary facts from which it might be inferred. Fed. R. Civ. P. 9(b).

Rule 9(b)'s Advisory Committee Notes direct those who wish to understand this provision to "[s]ee *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 22," on which Rule 9(b) is based. And Order 19, Rule 22, states the underlying rule quite clearly: "Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact *without setting out the circumstances from which the same is to be inferred.*" The Annual Practice, Order 19, Rule 22 (1937) (emphasis added); *see generally*, Christopher M. Fairman, *An Invitation to the Rulemakers—Strike Rule 9(b)*, 38 U.C. Davis L. Rev. 281, 286-87 (2004).

From the beginning, leading treatises identified Rule 9(b)'s lineage and acknowledged its meaning. *See, e.g.*, 1 Palmer D. Edmunds, *Federal Rules of Civil Procedure*, Comment 49 at 432 (1938) (quoting Order 19, Rule 22 as Rule 9(b)'s source). Rule 9(b)'s principal drafter, the Reporter for the Federal Rules himself, the Honorable Charles E. Clark, confirmed in his *Handbook of the Law of Code Pleading*, §48 at 313 n.87, that Rule 9(b) was based on Order 19, Rule 22—and its proviso that facts indicating state of mind need not be pleaded.[19]

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[19] Judge Clark also cited model Rules of Civil Procedure in the American Judicature Society Bulletin 14, 1919, art. 15 §18, which similarly provided:

> In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence,

From the outset, decisional law similarly recognized the obvious, applying Rule 9(b) to reject contentions that any facts must be alleged to show state of mind. In *Love v. Commercial Casualty Insurance*, 26 F. Supp. 481, 481-82 (S.D. Miss. 1939), for example, the plaintiff conclusorily asserted that a letter had been written with malice. The defendants insisted "that facts must be alleged in the complaint from which it can be inferred that the letter was written in fact with malice, and to aver generally that it was maliciously written is not sufficient as being a conclusion of the pleader." *Id.* at 481-82. The district court rejected such contentions, noting that Rule 9(b) "is very clear and is not open to any such construction as contended for by the defendants." *Id.* at 482. "This rule very probably was adopted from the rules of the Supreme Court of England, Order XIX, Rule 22, which provides that whenever it is material to allege malice, etc., it shall be sufficient to allege [the] same as fact without setting out the circumstances from which it is to be inferred." *Id.* at 482 (citing *Sargeaunt v. Cardiff Junction Dry Dock Co.*, (1926) W.N. 263).

> the facts must be stated with full particularity, but whenever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact, without setting out the circumstances from which the same is to be inferred.

Clark, *Handbook of the Law of Code Pleading*, § 48 at 313 n.87 (quoting *Rules of Civil Procedure*, Am. Jud. Soc. Bull. 14, 1919, art. 15 §18). The model was embraced by several states. *See, e.g., Ingalls v. Raklios*, 21 N.E. 2d 856, 857 (Ill. Ct. App. 1939) (quoting Ill. Mun. Ct. Rule 72: "Whenever it is material to allege malice, fraudulent intention, knowledge or other condition of mind, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred."), *rev'd*, 26 N.E. 2d 468 (Ill. Sup. Ct. 1940); *Broxmeyer v. Polikoff*, 39 Pa. D. & C. 224, 231 (C.P. Phila. County 1940) (quoting Common Pleas Rule 50: "Whenever it is material to allege . . . intent, knowledge or other condition of mind of any person, it shall be sufficient to allege the same as fact without setting out the circumstances from which the same is to be inferred.").

Some Second Circuit decisions, in derogation of Rule 9(b)'s command, began to require plaintiffs alleging securities fraud to plead facts raising "a strong inference of scienter."[20]

In *In re GlenFed, Inc. Securities Litigation*, 42 F.3d 1541, 1545 (9th Cir. 1994) (*en banc*) the Ninth Circuit convened *en banc* to construe Rule 9(b) in light of its history and the drafters' intent. The Court acknowledged Order 19, Rule 22 as "[t]he model for Rule 9(b)," and observed that the "Second Circuit's test is . . . irreconcilable with the second sentence of Rule 9(b)," which permits state of mind in all cases to be "averred generally." *GlenFed*, 42 F.3d at 1545. Requiring plaintiffs to plead facts raising any inference of scienter "conflicts both with the English rule which was the model for Rule 9(b) and with the second sentence of Rule 9(b) itself, which declares unequivocally that state of mind may be averred generally and says absolutely nothing about required inferences." *Id.* at 1546.

Whether the Second Circuit's more-demanding pleading standard might be good policy was "beside the point," in light of this Court's holding in *Leatherman* that such a result "'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Id.* (quoting *Leatherman*, 507 U.S. at 168). "We are not permitted to add

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[20] *See, e.g., O'Brien v. Nat'l Prop. Analysts Partners*, 936 F.2d 674, 676 (2d Cir. 1991); *Ross v. A. H. Robins Co.*, 607 F.2d 545, 588 (2d Cir. 1979); *see also* Marcus, *The Puzzling Persistence of Pleading Practice*, 76 Tex. L. Rev. at 1760 ("Not only did it contradict the rule, the Second Circuit's approach also thrust upon the courts the difficult problem of defining a 'strong inference' of scienter."); Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. at 447-48, 485 (an "ironic result"); William S. Lerach & Eric Alan Isaacson, *Pleading Scienter Under Section 21D(b)(2) of the Securities Exchange Act of 1934: Motive, Opportunity, Recklessness, and the Private Securities Litigation Reform Act of 1995*, 33 San Diego L. Rev. 893, 906 & n.77 (1996).

new requirements to Rule 9(b) simply because we like the effects of doing so," wrote the *en banc* court, in an exercise of judicial restraint. *Id.* "This is a job for Congress, or for the various legislative, judicial and advisory bodies involved in the process of amending the Federal Rules." *Id.*

Congress, of course, acted in 1995, enacting the Private Securities Litigation Reform Act to require that in private actions under the Securities Exchange Act of 1934, plaintiffs shall be required to plead facts raising a strong inference of scienter: "In any private action arising under this title in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall . . . state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. §78u-4(b).[21]

Notably, Congress chose to alter pleading standards *only* for securities fraud claims arising under the 1934 Act but not for any other claims—not even for ones arising under the Securities Act of 1933. The PSLRA enacted other reforms—to class-action procedures—adding parallel provisions to both the 1933 and 1934 Acts. *See* Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, §101, 109 Stat. 737-49 (1995); *compare* 15 U.S.C. §77z-l with 15 U.S.C. §78u-4. It also enacted parallel provisions concerning liability for forward-looking statements in both the 1933 and 1934 Acts. *Compare* 15 U.S.C. §77z-2 *with* 15 U.S.C. §78u-5. But *only* 1934 Act claims are subject to heightened pleading standards of any kind. *See* 15 U.S.C. §78u-4(b); *see generally* Hillary A. Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA's Internal*

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[21] *See generally* John Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 Bus. Law. 335, 345-47, 357-58 (1996); Lerach & Isaacson, *supra*, 33 San Diego L. Rev. at 893, 906-07.

Information Standard on '33 and 34 Act Claims, 76 Wash. U. L.Q. 537, 583-90 (1998).

That Congress chose to adopt a narrowly limited heightened pleading requirement—overriding Rule 9(b)'s proviso that state of mind may be generally averred—*only* for securities fraud cases under the 1934 Act should be dispositive: "'*Expressio unius est exclusio alterius.*'" *Swierkiewicz*, 534 U.S. at 513 (quoting *Leatherman*, 507 U.S. at 168). Petitioners can point to no similar legislative action authorizing heightened pleading standards for antitrust claims. Accordingly, conspiratorial state of mind may be "generally averred" under Rule 9(b), without setting forth any facts from which it might be inferred.

CONCLUSION

This is no time to abandon the notice-pleading principle adopted in the Federal Rules in 1938, and restated so many times by this Court's rulings—that plaintiffs need not plead the facts necessary to prove their case. Requiring fact pleading is particularly inappropriate in cases that deal with complex conspiracies stretching over months or years. In a civil rights case, Judge Easterbrook explained for the Seventh Circuit:

> The district court dismissed the complaint to the extent it sought relief from the nine individual defendants, observing that "the complaint does not . . . say of any defendant, as an individual, that he or she has done something." Nor did it need to. Complaints need not plead facts . . . . It is enough to specify the wrong done and leave details to later steps, such as motions for more definite statement, Fed. R. Civ. P. 12(e), and affidavits concerning summary judgment. When a collective body such as a school district takes a complex series of actions over a span of years, it may be difficult to pin down individual responsibility without discovery. If the complaint cannot survive a motion under Rule 12(b)(6) until each person's role is known, however, it may be impossible as a practical matter to obtain complete

relief. The school desegregation claim should proceed against all of the original defendants.

Palmer, 46 F.3d at 688 (citations omitted).

Antitrust conspiracies are apt to be all the more complex—and surreptitious. Plaintiffs should not be required to plead particularized facts prior to discovery.

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